

United States
Circuit Court of Appeals
For the Ninth Circuit

A. M. STANDISH,	<i>Petitioner,</i>
vs.	
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent,</i>
and	
BEATRICE M. STANDISH,	<i>Petitioner,</i>
vs.	
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent.</i>

Brief for Petitioners

R. CLARENCE OGDEN,
525 Standard Oil Bldg.,
San Francisco 4, California,
Attorney for Petitioners.

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JURISDICTION

This is a consolidated appeal taken from two decisions entered by the Tax Court of the United States based upon a single set of findings of fact and opinion promulgated by the said Tax Court of the United States on March 19, 1945, and applicable to each of the proceedings in which the decisions were subsequently entered on June 20, 1945.

The proceedings in the Tax Court of the United States were initiated by petitions for the redetermination of deficiencies in the income taxes of the respective petitioners for the years 1940 and 1941 as set forth by the Commissioner of Internal Revenue in his notices of deficiency dated November 8, 1943, and mailed on that date to the respective petitioners.

The petitioners, both of whom reside at Milpitas, Santa Clara County, California, and filed their income tax returns with the Collector of Internal Revenue, First District of California, filed their respective petitions with the Tax Court of the United States on February 2, 1944, pursuant to Section 272 of the Internal Revenue Code of the United States. The Commissioner filed his answers to the respective petitions on February 26, 1944, and thereafter on September 19, 1944, the two proceedings were ordered consolidated and were heard by the Tax Court of the United States on the same evidence.

On March 19, 1945, Findings of Fact and Opinion was promulgated and entered by that Court and thereafter and on June 20, 1945, Decisions in the respective proceedings were entered.

Within three months thereafter and on September 17, 1945, the petitioners served and filed with the Clerk of the Tax Court of the United States their respective petitions for review by the United States Circuit Court of Appeals together with assignments of error pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The petitions for the redetermination of deficiencies appear in the record:

Petition of A. M. Standish—Trans. of Record, p. 5 et seq.

Petition of Beatrice M. Standish—Trans. of Record, p. 21 et seq.

The answers filed by the Commissioner appear:

Answer to petition of A. M. Standish—Trans. of Record, p. 19 et seq.

Answer to petition of Beatrice M. Standish—Trans. of Record, p. 34 et seq.

The respective petitions for review by this Court appear:

Petition of A. M. Standish—Trans. of Record, p. 51 et seq.

Petition of Beatrice M. Standish—Trans. of Record, p. 61 et seq.

STATEMENT OF THE CASE

During the years 1940 and 1941, these petitioners were copartners and filed with the Collector of Internal Revenue at San Francisco, California, partnership income tax returns for the respective years as well as their respective individual income tax returns. This consolidated proceeding on review involves only the year 1941 and but one item claimed as a deduction in income for that year.

In 1943 the Commissioner of Internal Revenue assessed deficiency taxes against each petitioner and as

one of the adjustments resulting in the deficiencies for the year 1941 charged back to income of the partnership: "3. Fiduciary loss—\$10,512.92" and allocated one-half of that resulting increase to the income of each of these petitioners for that year. This adjustment was explained in the notice as follows:

"3. The loss of \$10,512.92 claimed as sustained by the Miles Standish Trust upon the loss of certain timber property because of failure to pay taxes owing to the State of Oregon is disallowed on the ground that any loss sustained is deductible by the Estate of Miles Standish, Deceased, or trust created by him, either prior to death or in his will."

The timber lands referred to in the last quoted paragraph are located in Coos and Douglas Counties in the State of Oregon. During his lifetime one Miles Standish owned an undivided one-half interest in those lands. Miles Standish died on June 22, 1932, and, following his death, the value of his one-half interest in said lands and timber at the date of his death, was appraised for purpose of fixing the amount of estate tax due thereon by the Commissioner of Internal Revenue as follows:

Douglas County property

Fir, cedar and spruce at \$1.00 per	
M board feet.....	\$ 8,187.00
Hemlock at 25c per M board feet	500.00
514 acres of land at \$1.00 per acre	514.00

Total value of decedent's one-	
half interest	\$ 9,201.00

Coos County property

Lands suitable for agri-

culture 520 acres

Timber lands 400 acres

Cut-over lands suitable

for reforestation 1000 acres

Total.....1920 acres \$16,000.00

Timber at 50c per M board feet..... 4,522.50

Total..... \$20,522.50

Value of decedent's half interest \$10,261.25

The total values of the Coos County properties were arrived at by giving a unit value of \$28.00 per acre for the 520 acres suitable for agriculture and \$1440.00 or approximately \$1.00 per acre for the remaining 1400 acres located in Coos County.

In the year 1941, all of the lands and timber formerly owned by Miles Standish, located in the County of Douglas, State of Oregon, were sold by the sheriff of that county for the non-payment of taxes assessed thereupon by the State of Oregon.

In the same year the sheriff of Coos County, State of Oregon, sold all of the lands formerly belonging to Miles Standish, located in his county above referred to as suitable for agriculture and all the remaining timber and lands with the exception of certain thereof which had been disposed of prior to the year 1941, for \$3521.95 for Miles Standish's one-half interest and also

lands suitable for reforestation which were not sold and which had a value as above determined, of \$500.00.

On June 17, 1932, five days prior to his death, Miles Standish signed and delivered a certain indenture by which he attempted to transfer to himself, his son, Allan M. Standish, and Beatrice M. Standish, as trustees, various tracts of timber land more particularly described in said indenture and which included his one-half interest in the said timber lands located in Coos and Douglas Counties, Oregon. That indenture provided that the said trustees were to hold the said lands in trust however, for the uses and purposes therein specified. The grantor reserved the income and/or proceeds from all of the said properties to himself during his lifetime and also reserved to himself the right to revoke the said transfer at any time prior to his death.

The pertinent provisions of that indenture are:

“Fourth:—The property herein referred to shall be held by the Trustees and during the lifetime of the Grantor, the net income and proceeds therefrom shall be paid to the Grantor in quarterly installments as nearly as may be practicable; and upon the death of the Grantor said income and proceeds shall be paid as follows:

- (a) Fifty-one per cent (51%) of said net income shall be paid to Allan M. Standish;
- (b) Seventeen per cent (17%) of said net income shall be paid to Beatrice M. Standish, wife of Allan M. Standish;

(c) Sixteen per cent (16%) of said net income shall be paid to Patricia Standish;

(d) Sixteen per cent (16%) of said income shall be paid to Beatrice Standish.

“This division of the net proceeds and income from the said property shall continue until the youngest grandchild shall have attained the age of thirty (30) years, when the Trustees shall convey to the Beneficiaries then living, all of the property then remaining in this trust, in such proportion as their respective interests are indicated by the percentages upon which the income has been paid to them, and the trust shall cease.

“Fifth:—As incidental to the trust herein created the Trustees shall have full power and authority, in their discretion, to manage, control, sell, transfer, mortgage, convey, lease, exchange, and otherwise deal with, and dispose of, any or all of the trust estate, and to execute any instruments necessary for the exercise of such powers, and should corporate stock come into said estate to make any and all transfers thereof into their name as in any case may be necessary or proper for and in the administration of the trust; to collect rents or other incomes; to collect at maturity any and all securities, to invest and re-invest the proceeds of the sale of any property, real or personal, and the property in which the proceeds of sales or exchanges may be invested, or property received in exchange, may be again sold or re-exchanged as often as the Trustees shall see fit and the proceeds re-invested; and the Trustees shall also have the power to pay all taxes, assessments and charges

levied upon or against the property held in trust, employ clerical or other assistance, and also legal counsel whenever in their judgment it is necessary so to do. (Transcript of the Record, pp. 93-94.)

. . .

“Eighth:—In the event that I have any additional grandchild or grandchildren living at the time of my death, the shares of Patricia and Beatrice Standish shall be proportionately reduced so that such additional grandchild or grandchildren shall share equally with them.

“Ninth:—In the event that any grandchild shall die prior to the time that the respective beneficial interest due said grandchild shall become payable in whole or part as herein provided, then the invested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any deceased grandchild to take by representation.

3. In the event that all of said grandchildren die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party under the law of succession as the same exists at

the date of this instrument.” (Transcript of the Record, pp. 95-96.)

Upon the death of Miles Standish an instrument was produced dated January 7, 1930, which was later admitted to probate in the Superior Court of the State of California, in and for the County of Santa Clara, as the last will and testament of Miles Standish, Deceased. This last will, after making certain specific bequests with which we are not here concerned, provided as to the residue of any estate or property owned by the decedent at the time of his death as follows:

“Fourth:—I give, devise and bequeath to my said son, Allan M. Standish, all of the residue of my property and estate of every kind and nature, and wherever situate, of which I may die seized or possessed or in which I may have an interest, in trust, nevertheless, for the following uses and purposes, that is to say: To have, hold, manage and control, bargain, sell, transfer, exchange, invest and reinvest the proceeds thereof; to collect the income therefrom, and out of said income pay over one-half thereof to the Trustees of a certain Trust created by agreement in writing, dated the 7th day of January, 1930, made and executed by Miles Standish, the party of the first part therein named, and Miles Standish and Allan M. Standish, his son, the parties of the second part therein named, their successors and survivors, which said trust agreement is hereby referred to and made a part hereof, in trust, nevertheless, for the use and benefit of my grandchildren, Patricia Standish and Beatrice

Standish, the children of my said son, Allan M. Standish, and for the use and benefit of any other child or children hereafter born to my said son Allan M. Standish, in equal shares, as provided by the terms of said last named Trust, and to pay over the remaining one-half of said income to my said son Allan M. Standish, in his own right and for his own use and benefit; and as fast as said property is sold and the proceeds thereof collected, pay over and distribute the same in the manner and in the same proportions as said income is to be paid over and distributed.” (Transcript of the Record, pp. 105 to 106.)

Following the death of Miles Standish no probate proceedings were commenced in the State of Oregon. However, Allan M. Standish and Beatrice M. Standish as the survivors of the three grantees and trustees named in the indenture dated June 17, 1932, and above quoted from, assuming that said indenture had effectuated a valid transfer of one-half interest in the Oregon lands, presumed to act as such trustees and filed each year with the Collector of Internal Revenue fiduciary returns in which the proceeds of a few sales were reported as the proceeds of sales made by them as trustees under the instrument which they assumed had created a valid trust. The proceeds of these sales aggregated during the eight years prior to 1941 the sum of \$3521.95.

The administration proceedings over the estate of Miles Standish, Deceased, located in the State of California, were continued until July 24, 1942, at which

time the court construed the provisions of the last will of Miles Standish above quoted and distributed the residue of the California estate as follows:

“It Is Further Ordered, Adjudged and Decreed, That all the rest, residue and remainder of the estate now known or which may hereafter be discovered, including any part remaining in the trust hereinabove last decreed upon the death of Martha A. Standish, is hereby distributed as follows, to wit:

A one-half undivided interest therein to Allan M. Standish, the son of said deceased, individually and for his own use and benefit, and the other one-half undivided interest therein to Allan M. Standish in trust for the following uses and purposes:

To have, hold, manage, handle, control, bargain, sell, transfer, exchange without further order of this court, and to invest and reinvest the proceeds thereof, collect the income therefrom, and to pay and set over to Patricia Standish and Beatrice Standish in equal shares such portion of the income therefrom and such portion of the proceeds of the sale of any property as in the judgment of the said trustee may be so distributed after deducting any amounts necessary to care for and pay the necessary expenses upon the remaining property of said trust, and in any event to set over, transfer and convey to the said Patricia Standish and Beatrice Standish in equal shares all of said one-half undivided interest in said residue which may then remain on the 22nd day of June, 1947.”
(Transcript of the Record, page 115.)

In December, 1935, the petitioners here entered into a partnership agreement by the provisions of which each set over to the other a one-half interest in everything either of them owned whether the title thereto was originally acquired by inheritance or otherwise and a copy of this partnership agreement was filed with the Treasury Department of the United States and has been acted on in connection with income tax returns since that time.

QUESTIONS INVOLVED

Under the facts of this case, we submit that the questions involved are as follows:

1. By whom was the title and right of possession to the one-half interest in the Oregon lands formerly owned by Miles Standish held at the time those properties were lost by tax sale in the year 1941?

This question involves the following:

(a) Did the so-called "Deed of Trust" (Petitioners' Exhibit No. 1) effectuate a valid transfer *inter vivos* in trust or was that instrument void for the reason the provisions thereof violated the rule against perpetuities?

(b) If, as we contend, the last mentioned "Deed of Trust" was ineffectual as a transfer, then, was the interest in real property located in the State of Oregon an asset held by the Executor of the estate of Miles Standish, Deceased, in the probate proceedings then

pending in the Superior Court of the State of California, in and for the County of Santa Clara?

(c) In the absence of any probate proceedings brought in the State of Oregon or the appointment of any executor or administrator under the laws of that State, did the title to Miles Standish's interest in real property situate in that State vest in the devisees immediately upon his death as directed by the provisions of the last will of Miles Standish, Deceased, applicable to the residue of the decedent's property?

(d) If, as we contend, title to the Oregon real property did vest in the residuary devisee or devisees, who are those devisees:

(1) Allan M. Standish as trustee for the benefit of himself and others, or

(2) Allan M. Standish individually as to a one-half interest and Allan M. Standish as trustee for the benefit of others as to the other one-half interest?

Those questions are presented:

1. By the explanation assigned by the Commissioner in his notice of deficiency which we have quoted above. (Transcript of Record, pp. 16-17.)

2. By the petitions for redetermination of the deficiency filed with the Tax Court of the United States in both of which it is set forth that the Commissioner erred:

“C. For the year 1941 the Commissioner erred in increasing petitioner's income by \$5,256.46 by

disallowing the loss of \$10,512.92 claimed as a deduction on the partnership return of petitioner and his wife, Beatrice M. Standish, with respect to the loss of certain timber properties in the State of Oregon from abandonment and nonpayment of taxes, and particularly erred in determining that 'any loss sustained is deductible by the estate of Miles Standish, deceased, or the trust created by him, either prior to death or in his will.' The last mentioned determination by the Commissioner is erroneous because the 'trust' to which this property was 'conveyed' was completely void, and because no probate proceedings having ever been commenced in the State of Oregon, the timber property located in that State, and the title thereto, passed to, and was vested in, A. M. Standish immediately upon the death of Miles Standish, and the loss sustained (now believed to be \$7,471.80, rather than \$10,512.92 claimed on the return) was sustained by the partnership as the successor in interest to said timber properties of the said Allan M. Standish, rather than by any estate or trust of, or created by Miles Standish.'" (Transcript of Record, pp. 6-7 and 22-23.)

3. By the answer of the Commissioner denying the last quoted allegation.

4. By the opinion of the Tax Court of the United States promulgated in the consolidated proceedings in which it is found or determined with respect to the instrument dated June 17, 1932:

"We are of the opinion that by the terms of the trust, under the law, there was also, as of that

date, an immediate vesting of interest in the *corpus* or remainder. The fact that as of the date of the trust there was a possibility of divesting of the estates of the grandchildren and a redistribution to accommodate an after-born child does not affect the vesting or make it contingent. It is our opinion that, looking to the four corners of the trust, the grantor contemplated immediate vesting of interest of the *corpus* of the property in the several beneficiaries.

The consequence of our ruling that the property had vested as of the date of the grantor's death is that petitioners are not entitled to deduct the loss sustained on the Coos County and Douglas County properties." (Transcript of the Record, p. 48.)

SPECIFICATION OF ERRORS

1. The Tax Court of the United States should have determined that the trust instrument dated June 17, 1932, signed by Miles Standish, by its provisions fixing the term thereof for a longer period of time than lives in being and twenty-one years plus the period of gestation, violated the rule against perpetuities as said rule is applicable in the States of California and Oregon and that therefor the said instrument was void and that no transfer of title to any of the lands therein described was effectuated *inter vivos*.

2. That the Tax Court of the United States should have determined that a one-half interest in the testator's one-half interest in the Oregon lands vested immediately upon the testator's death under the resi-

due clause of his last will in A. M. Standish as his individual property free of any trust.

3. That the Tax Court of the United States should have determined that the one-fourth interest acquired by A. M. Standish in the Oregon lands as his individual property passed to the partnership of A. M. Standish and Beatrice M. Standish in December, 1935, and that the loss sustained from the abandonment and non-payment of taxes upon the said lands in the year 1941 is deductible from the partnership income as set forth in the partnership return of these petitioners for the year 1941.

4. That the Tax Court of the United States should have determined in view of its findings that "the loss to the Standish interests was \$15,440.31, that the partnership sustained one-half of that loss in 1941 or \$7,720.15 and that such loss is a proper deduction from the partnership income for said year of 1941.

ARGUMENT

I.

Inter-Vivos Trust Void

"To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary a legal purpose and a legal term. While equity will in certain instances make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the ~~first~~ itself must fail." (Italics ours.) ~~Trust~~

In re Walkerley, 108 Cal. 627, 650.

“The rule against perpetuities allows the postponement of the vesting of an estate or interest for the period of lives in being and twenty-one years and the period of gestation.”

21 R. C. L., page 291, and cases there cited.

That rule is the one governing in Oregon.

Imbrie vs. Hartrampf, 100 Oregon 589, 198 Pac. 521.

“The rule against perpetuities is not a rule of construction but a positive mandate of law to be obeyed irrespective of the question of intention. The proper procedure is to determine the true construction of the will or deed involved, just as if there was no such thing in existence as the rule against perpetuities, and then to apply the rule rigorously, in complete disregard of the wishes and intentions of the testator or grantor.”

21 R. C. L., page 294.

The indenture here under consideration (Petitioner's Exhibit No. 1—Trans. of Record, p. 91), was made on June 17, 1932, while the grantor was alive. It purported to convey the legal title to named Trustees in trust for grandchildren who might thereafter at any time before the grantor's death, be born. It provided that the legal title to the properties should be held in trust until the youngest grandchild, including those yet unborn, reached the age of thirty years. Legal titles to the lands or the proceeds from the sale thereof might not vest in the beneficiaries until an

unborn child, so far as was known at the time the indenture was signed and delivered, reached the age of thirty years. Indeed, at the time the instrument became effective, if at all, it was impossible to know in whom the *corpus* of the trust fund would ultimately vest.

It is true, that as events subsequently developed, the grantor died five days after executing the indenture and that the only grandchildren then living were the two that were alive when the indenture was signed. But that is immaterial.

“In applying the rule against perpetuities to future estates created by conveyances *inter vivos* the period allowed is computed as commencing when the conveyance takes effect.”

21 R. C. L., page 294;

Notes: 49 A. S. R. 119;

21 Eng. Rul. Cas. 131.

The instrument here in question effected a transfer *inter vivos*, or none at all.

“It is fundamental that, while possession of enjoyment of an estate may be deferred, a deed, to be operative, must pass a present interest.”

8 R. C. L., 930 and cases there cited;

Annotation 1—L. R. A. (N. S.) 315.

The instrument specifically provides:

“In the event any grandchild shall die prior to the time that the respective beneficial interest

due said grandchild shall become payable in whole or in part as herein provided, then the invested beneficial interest due said grandchild shall revert as follows:

1. If said deceased grandchild shall leave lawful heir of his or her body then such legal heir or heirs shall become the beneficiary in the place and stead of his or her parent by right of representation.

2. In the event any deceased grandchild leaves no legal heirs, then the beneficial interest to which said grandchild would otherwise be entitled shall revert to the equal benefit of the surviving grandchildren, the legal issue of any deceased grandchild to take by representation.

3. In the event that all of said grandchildren die without legal issue prior to the vesting of all of said trust estate, so much as remains shall be paid or delivered to any heirs of the first party.” (Trans. of Record, p. 95.)

While the indenture provides that after the grantor is dead the income from the trust property is to be paid over currently to the named beneficiaries, it provides, as to the *corpus*, that the trust is to continue “until the youngest grandchild shall have attained the age of thirty (30) years.” And during the life of the trust the *corpus* is to be invested and reinvested by the trustees.

No other conclusion can be reached, therefore, than that the general purpose of the testator as to all the property covered by the indenture, clearly expressed

by that instrument, was that the property or the reinvested proceeds thereof, was to be held by the trustees for thirty years after his youngest grandchild who might be thereafter born came to being.

“A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being.”

In re Walkerly, 108 Cal. 627, 647.

As pointed out in the last cited case at page 648:

“Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.”

And subsequently in the same case (*In re Walkerly*, *supra*, page 656) the law is appropriately stated:

“In the event of a sale still the proceeds are to be held and invested until distribution. . . .”

“The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law.”

Citing:

Hawley vs. James, 16 Wend. 150;

Haynes vs. Sherman, 117 N. Y. 433.

“The common law rule against perpetuities does not apply only to landed estates. Executory devises, springing and shifting uses, and trusts

whether of realty or personalty were all within its terms."

In re Walkerly, supra, p. 657;

1 *Jarman on Wills*, ch. 9;

Lewis on Perpetuities, p. 159;

Perry on Trusts, secs. 377, 384;

4 *Kent's Commentaries*, 271;

Note: 49 A. S. R. 127.

"The fundamental rule is that a private trust cannot be created so that the vesting of future interests will be postponed beyond the period prescribed by the rule."

21 R. C. L., p. 306, and cases there cited.

"The general rule may be asserted as being that for the purpose of determining whether there is a violation of the rule against perpetuities, the possibility of issue is never considered extinct."

Note: 48 L. R. A. (N. S.) 867 and cases there digested.

The conclusion is inescapable that the "Deed of Trust" of date June 17th, 1932, by its clearly expressed provisions violates the rule against perpetuities and is void. Title to all the property described therein remained, *untransferred*, in the grantor.

II.

Will Devises One-half the Residue to Allan M. Standish

The Superior Court of the State of California in making final distribution of the Estate of Miles Standish, Deceased, situate in that State, interpreted the

residuary clause of the decedent's last will as effecting an outright devise of an undivided half interest in the residue of the estate of Allan M. Standish and distributed only the other half to him as Trustee for the grandchildren. This construction is unquestionably correct and in sound agreement with the law of Trusts.

We realize that the decree of distribution dealt with only property located in the State of California but as an adjudication construing the effect of the Will it does affect all property title to which depends upon that construction.

“A fundamental essential to the existence of any trust is the separation of the legal estate from the beneficial enjoyment; and no trust can exist where the same person possesses both. . . . ”

“Absolute control and power of disposition are inconsistent with the idea of a trust.”

26 R. C. L. 1186;

See Note: 7 L. R. A. (N. S.) 1119.

The Will (Petitioners' Exhibit 2, Trans. of Record, p. 105) provides that Allan M. Standish is to have complete control over and power to sell immediately any of decedent's property constituting the residue of the estate and directs: “and as fast as said property is sold and the proceeds collected, pay over and distribute the same” one-half for the benefit of the grandchildren and the remaining one-half to Allan M. Standish, “in his own right and for his own use and benefit.”

So far as the one-half interest devised to Allan M.

Standish there is: (1) No separation of the legal from the beneficial estate; (2) Absolute control and power of disposition vested in the same person with no possibility of a divesting thereof; (3) the absence of not only a legal purpose and a legal term but of any purpose or of any term whatever.

The paragraph "Fourth" of the Will is susceptible of no other interpretation than that it devised a one-half interest in the residue of the testator's estate to his son absolutely and free of any beneficial interest therein, either contingent or otherwise, in any other person.

III.

California Estate of Miles Standish, Deceased, Had No Rights in Oregon Lands

For the reasons set forth in subdivision I, it is apparent that immediately prior to the death of Miles Standish, title and the right of possession to the timber lands in Coos and Douglas Counties, Oregon, were vested in him. Upon his death one-half of that title passed to Allan M. Standish for the reasons set forth in subdivision II.

In the absence of the appointment of any executor or administrator under the laws of the State of Oregon the right to immediate possession, as a tenant in common owning a one-quarter undivided interest in those lands also immediately vested in Allan M. Standish.

“The Real property of the deceased is the property of those to whom it descends by law or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, and upon the termination of the administration thereof, so much of such real property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor; . . . ”

Oregon Compiled Laws Ann. Vol. 2, Section 19-1202.

The Oregon Courts have construed that statute to mean :

“The fee title to and ownership of the real property of a decedent passes immediately upon his death to his heirs or devisees subject only to the payment of the debts of the deceased and the right of the personal representative to possession for the purposes of administration.”

D'Arcy vs. Snell, 162 Oregon 351, 91 Pac. (2d) 537.

The Findings promulgated in the Court below find from the evidence that the Will of Miles Standish, deceased, was not probated, that no administrator or executor of his estate was appointed and that decedent had no debts in Oregon. (Trans. of Record, pp. 42-43.)

Neither the Estate of Miles Standard, deceased, as a legal entity brought into being by probate pro-

ceedings in the State of California, nor the Executor acting under authority of the California Court had any right in or to real estate lying without the boundaries of California.

Estate of Leonora M. Hills, 176 Cal. 232, 169 Pac.

“With regard to real property, the law of the State in which it is situated as it exists at the date of the death of the owner controls the descent.”

Estate of Leonora M. Hills, see page 234.

There were ample assets of the estate of Miles Standish over which the Executor, appointed by the California Court, had control to pay all debts, taxes and expenses of administration and all thereof were paid therefrom. (Decree of Final Distribution Petitioners' Exhibit 3, Trans. of Record, p. 110.) Under these circumstances the individual title and rights of the testator's son vested under Oregon laws, could not become divested to give the California estate any claim to those lands or the proceeds of any sale thereof.

Estate of Leonora M. Hills, *supra*, at p. 234.

In December, 1935, when Allan M. Standish transferred to the partnership of himself and wife everything of which he was then possessed, he transferred to that partnership both the title to an undivided quarter interest and the then present right of possession to the Oregon lands which had previously vested in him under the laws of that State.

IV.

**Loss Found by the Tax Court of the United States Was
the Loss of These Petitioners**

The Court below has found:

“The loss to the Standish interests was \$17,-201.28, composed of loss on Douglas County tax sale (\$9,201) and loss on the Coos County lands (\$8,000.28).” (Trans. of Record, p. 39.)

This determination is in error to the advantage of these petitioners. The testimony is that \$3,521.94 had been received as the Standish share of the proceeds of sale of timber prior to 1941. The Tax Court of the United States deducted only one-half of that amount from the cost basis of the Coos County Lands. We feel that in good conscience the error should be corrected and that the finding should be considered as reading “the loss to the Standish interests was \$15,440.31.”

The finding, as corrected, is binding on appeal:

“The question ‘said the Court in *Rhodes vs. Commissioner*, 6 Cir. 100 Fed. 2d 966, 969,’ whether property becomes worthless during a particular year is one of fact. The Board made a determination of fact, and the only question of law presented for review is whether the Board’s findings are supported by substantial evidence.”

Commissioner vs. Peterman, 118 Fed. 2d 973, 976.

That loss resulted in the taxable year 1941 and for the reasons assigned in subdivisions I, II and III above the "Standish interests" were vested in 1941:

1/2 thereof in the partnership of Allan M. Standish and Beatrice M. Standish.

1/2 thereof in the Trust created by the will of Miles Standish, deceased.

The half belonging to the partnership and sustained by it in that year amounts to \$7,720.15 and the income of each of these petitioners, as redetermined by the Commissioner because of the disallowance of their respective shares of that loss, should be reduced by \$3,860.07. Their respective deficiencies should each be reduced accordingly.

Respectfully submitted,

R. CLARENCE OGDEN,
Attorney for Petitioners.

